IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. [redacted] 35

GUSTAV H. KANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF GUSTAV H. KANN FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION OF GUSTAV H. KANN FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT ENTERED FEBRUARY 4, 1944, BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AFFIRMING A SENTENCE OF CONVICTION ENTERED OCTOBER 30, 1943, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND UNDER TWO COUNTS OF AN INDICTMENT CONTAINING THREE COUNTS.

OPINION BELOW.

There was no opinion in this case by the United States District Court for the District of Maryland. The opinion dated February 4, 1944, by the United States Circuit Court of Appeals for the Fourth Circuit has not been reported but is contained in the Record, pages 214-218.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review the judgment of February 4, 1944, by the Circuit Court of Appeals for the Fourth Circuit is invoked under Sec. 240 of the Judicial Code as amended (28 U. S. C. A. 347). See also Rule 38 of this Court, 28 U. S. C. A., following Sec. 354 and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

FEDERAL STATUTE INVOLVED.

The Federal Statute involved is Section 215 of the Criminal Code (18 U. S. C. A., Sec. 338):

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

QUESTIONS PRESENTED.

I. Whether the constitutional and statutory rights of this petitioner are not infringed by a conviction under Section 215 of the Criminal Code, (Title 18, Section 338, U. S. C. A.) of using, or causing the mails to be used to defraud, when the evidence shows that the only use of the mails was by banks which, after cashing certain checks, mailed them to obtain reimbursement.

II. Whether the constitutional rights of this petitioner under the Fifth Article in the Bill of Rights to the Constitution of the United States are not infringed when the evidence of fraud was more consistent with innocence than with guilt.

Although we recognize that ordinarily this Court will not review questions of evidence, the petitioner's innocence is so plainly consistent with the proof as to call for review. To this we may add that the opinion of the court below undertakes no reasoned analysis of the parts of the evidence which are claimed show fraud, but baldly adopts the government's contentions without in any way mentioning, let alone discussing, other substantial and uncontradicted testimony which, if it did not entirely remove all these contentions from debate, certainly showed that they were in harmony with innocence. Some of the evidence gave rise to suspicion in a few instances but even this was dispelled when all the proof was in. For this reason we have felt constrained to make a detailed narration of the facts *as established by the evidence in the Record.* It is earnestly submitted that a fair examination will demonstrate that the government failed to prove any fraud to which the petitioner was a party.

STATEMENT OF THE CASE.

The Indictment and Proceedings Below.

The petitioner is one of eight defendants who were indicted on February 16, 1943, charged with using the mails in a scheme to defraud (Criminal Code, Section 215, U. S. C. A., Title 18, Sec. 338). The indictment is in three counts. Each count alleged the same fraudulent scheme and the mailing of different checks was made the basis of each count.

Briefly, the scheme alleged consisted in the subcontracting by Triumph Explosives, Inc. of government contracts to Elk Mills, a subsidiary, with the intention that a large part of the profits should be distributed to the defendants through salaries, dividends and bonuses. The indictment further alleged the mailing of separate checks, one of which was set forth in each of the counts, for the purpose of executing the scheme. The petitioner pleaded "not guilty" and the other defendants, "nolo contendere".

When all the testimony was in, the petitioner requested the trial judge to instruct the jury to return a verdict of "not guilty" because the evidence showed the mails were not used for the purpose of executing the schemes alleged, and because the evidence was legally insufficient to prove the petitioner's fraud. These requests were refused and exceptions were duly noted.

The first count was abandoned at the trial and the jury returned a verdict of "guilty" on the second and third counts. On October 30, 1943, the District Court entered its judgment that the petitioner be imprisoned for a period of three years and pay a fine of $2,000 and costs. An appeal was filed in the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of conviction on February 4, 1944.

The Mailing of the Checks Upon Which the Indictment Was Based.

The check described in the second count of the indictment was a check of the Elk Mills Loading Company, drawn on the corporation's Elkton bank in payment of a bonus to one of the company's consultants, V. G. Willis. This check was carried by Willis to Newark, Delaware, where it was unqualifiedly endorsed or cashed by him at his Delaware bank. The bank in turn, to reimburse itself, mailed the check to the bank at Elkton. The second count is predicated upon this mailing by the Newark bank.

The mailing involved in the third count was the mailing of a check of the contractor Jackson, made payable to the five key men hereinafter identified (of whom the petitioner was not one). This check was cashed at the Elkton bank and in turn mailed by the Elkton bank to the bank upon which it was drawn at Wilmington, Delaware, to reimburse itself.

As is hereafter shown in the brief, assuming a fraudulent scheme existed, these mailings would not constitute a violation of the mail fraud statute under the decisions in the Fifth and Tenth Circuits but only in the Fourth Circuit.

History of Triumph Explosives.

Triumph Explosives, Inc., a corporation located at Elkton, Md., was originally a comparatively small company engaged in the manufacture of fireworks, fuses and signal lights. With the outbreak of war in Europe the company began to receive contracts from various governments for munitions, and after the United States became involved in the war these contracts rapidly swelled in number so that the Government of the United States became the company's principal customer.

Mr. Gustav H. Kann, of Pittsburgh, Pa., the petitioner, was the president of the company. His duties consisted chiefly in looking after financing. He had nothing to do with matters of production, plant expansion, building (R. 177),* or the securing of contracts, although in a general way he knew of the workings of the company. The actual operation of the production units was under the supervision of Mr. Joseph B. Decker, the vice-president and production manager, who resided at the corporation's place of business in Elkton, Md.

The Key Men.

Connected with the company since its inception (R. 408) were certain individuals, referred to throughout the Record as "key men," Feldman, Prial, Willis, Deibert and William L. Kann, Jr. (the last named being a nephew of the petitioner) who through practical experience and application had acquired "know how" in the manufacturing of explosives (R. 367), and held highly important positions in the company** (R. 408). As the profits multiplied these men increasingly manifested signs of dissatisfaction (R. 408) with the amount of their remuneration (R. 363, 5, 7). Due to the great dearth of men skilled in the explosives field (R. 367), it would have been an easy matter for these men to make connections with other companies engaged in manufacturing explosives (R. 367, 8) and their leaving would have been very damaging to this company which was deeply immersed in an ever-growing backlog of Government orders for munitions (R. 412).

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* Unless otherwise noted, references are to the record from the Circuit Court of Appeals below which has been filed in this Court.

** The designation "key men" used hereafter refers solely to these individuals and does not include the petitioner.

Loan Agreement With Banks—
Limitation on Capital Expenditures.

The corporation had a loan agreement with the People's Pittsburgh Trust Company of Pittsburgh and the Federal Reserve Bank of Cleveland, which prohibited the company from making investments in capital assets, that is, in land, buildings, and equipment, beyond certain stipulated sums; and it also was limited in increasing salaries of employees beyond a certain point, without prior approval of the banks. The principal reason for the limitation on capital expenditures was the desire of the banks to assure that the loan be susceptible of easy liquidation on maturity (R. 277). The banks did not want more than the stated amount to be expended for plant expansion since this would render liquidation of the loan very difficult, if not impossible. The agreement contained a clause by which the limitation on capital expenditures could be raised after application and approval by the banks.

The original limitation was for $160,000 in capital expenditures and ran from August 1, 1940, to March 1, 1942 (R. 289). It was amended on August 14, 1941, by increasing the limitation to $240,000 but the period during which the permissible expansion in capital assets could be made again started from August 1, 1940, and ran to September 15, 1942 (R. 290). The limitation extended to all expenditures for capital assets during the entire period between the dates mentioned (R. 290, 291).

The Incendiary Bomb Contract.

In the latter part of 1941, the Chemical Warfare Service of the United States Government requested the company to bid on the manufacture of incendiary bombs, an entirely new product. Its manufacture entailed hazardous work and it was not known at the beginning what profit, if any, could be made (R. 417, 419); nor was there

any accurate gauge by which the cost of producing the bombs could be measured. At first it was felt that such a contract would be an undesirable one for the company and a high bid was purposely submitted (R. 358), but, as the Government urged the company to bid, a bid more in line with the estimated cost of the manufacture of this product was later made, and on November 27, 1941 (R. 359), a contract was awarded the company for 3,800,000 incendiary bombs at 39.78 cents per bomb, totaling roughly $1,500,000 (R. 369). All the negotiations leading up to this contract were carried on by the key men of the company and Mr. Decker, the operating vice-president (R. 358, 359). The petitioner, whose duties did not include negotiating for contracts, had no part in these negotiations and did not know that a contract had been awarded until later (R. 360, 390, 407), although he did know in a general way that negotiations were going forward concerning incendiary bombs (R. 409).

Feldman Memorandum—Elk Mills Created.

On December 3, 1941, a memorandum was handed to the petitioner, signed by S. M. Feldman, one of the key men (R. 405, 6). Although the petitioner had heard talk of separate companies for doing certain work (R. 405), this was his first specific knowledge of any plan for the creation of Elk Mills (R. 405). The paper gives the background of the contract and states the initial unwillingness to bid on the contract but asserts that later the key men requested Decker to bid (R. 358), with the understanding that, upon receipt of the contract it would be sublet to a new company which would perform all the work called for by the contract (R. 358) and would agree to pay a 10% profit on the face amount to Triumph (R. 358). The paper made known to the petitioner for the first time (R. 407) that a contract had been entered into between the War

Department and Triumph for the manufacture of incendiary bombs; that a corporation known as Elk Mills Loading Corporation had already been formed for the purpose of carrying out the contract (R. 359); that the costs of incorporation had been paid for by Mr. Feldman (R. 359); and called for a division of the stock of the newly-formed company equally among the several key men, the petitioner, and Decker (R. 359). The memorandum further stated: "The plant has been laid out and construction is to start very shortly."

More About the Limitation on Capital Expenditures.

In order that what followed may be understood in its proper perspective, a little more must be said about the situation then prevailing with respect to the limitation on capital expenditures. On November 28, 1941, approximately a week prior to Mr. Kann's receipt of Mr. Feldman's memorandum, the limitation had been raised to $300,000, again including all capital expenditures theretofore made from August 1, 1940, to September 15, 1942 (R. 290, 291). This last increase was necessitated by the banks' discovery on November 19, 1941, that Triumph had already exceeded the previous $240,000 limitation (R. 291, 2). Triumph's explanation was that in considering the sum laid out for capital expenditures they figured on the net sum invested after depreciation, but the banks insisted that the limitation referred to the gross amount invested in capital assets (R. 293). Since Triumph, under the banks' interpretation, had already exceeded its authorization and since the breach was a technical one (R. 293), the limit was raised to $300,000, but the corporation was warned to "watch its step" (R. 411) and to be very careful not to expend more than the authorized amount in capital assets (R. 293).

Although the limit was thus raised to $300,000 because, according to the Banks' computation the company had already expended over $293,000 in capital assets (R. 281), only the difference, approximately $6,200, was therefore actually available for capital investment on all the contracts of the company (R. 281) for a period of several months (R. 412), and on this occasion the Federal Reserve Bank in a letter to the People's Pittsburgh Bank stated, "we must insist that they keep within the limitation of $300,000" (R. 293).

The entire history of the Loan Agreement was marked with great difficulty for the corporation for the banks took a very rigid view of the provision dealing with capital investments, and on many occasions the corporation was made to know, in no uncertain terms, that the banks would not tolerate larger investments in capital assets than permitted by the agreement (R. 410, 411); and efforts to obtain the banks' permission to increase the authorized capital expenditure invariably met with great resistance on the part of the banks (R. 410, 411).

Improbability of Banks Permitting Triumph to Make Necessary Expenditures.

Since the incendiary bomb contract required capital expenditures of between $200,000 and $250,000 (R. 269), and in view of Triumph's unfavorable standing with the banks at this time (R. 413) and the great difficulties experienced on former occasions in securing permission to spend comparatively trivial sums (R. 375, 6, 410, 411), it was felt it would be useless to request the banks to permit such a large outlay in capital assets (R. 366, 391, 375, 413). And even if the government advances on the contract were used for capital assets, both the petitioner and Mr. Weil, the company's counsel, who dealt with the banks, believed such use would likewise violate the Bank Agreement (R. 414).

The Dilemma.

The company was thus in the unfortunate position of having a contract with the War Department for vitally needed munitions which it could not fulfill because the banks would not sanction the necessary capital expansion (R. 371, 375). Aside from the natural patriotic desire to furnish the War Department the sorely needed munitions, on purely business grounds the company could not afford to breach the contract and thereby expose itself to ruinous litigation (R. 371) or, at best, antagonize its chief customer, the Government of the United States. Nor could it proceed with the contract without violating its agreement with the banks (R. 370, 371, 412, 413).

Proposal to Resolve Dilemma by Using Elk Mills.

When the petitioner received Feldman's memorandum he consulted Mr. Weil (R. 356), general counsel of Triumph. Mr. Weil was critical of the proposed plan and the petitioner requested him to attend a board meeting of Triumph at Elkton on December 11, 1941 (R. 361). Mr. Weil did so, and at this meeting it was explained that the performance of the contract would necessitate the expenditure of large sums in capital assets (R. 41), and since the banks had indicated their unwillingness to assent to such further capital expenditures (R. 41), and in order to carry out the contract and satisfy the demands of the key men for greater remuneration (R. 42), it was proposed that the contract be sublet to Elk Mills Corporation and if the government would advance sums to Triumph on the contract, Triumph would in turn make advance payments to Elk Mills to acquire the necessary equipment and machinery (R. 43).

Under the arrangement, the five key men were personally to pay for and acquire suitable land (R. 44) for the erection of a plant and to transfer this land to Elk Mills.

In return they were to receive 45% of the stock of Elk Mills (R. 44); the remaining 55% of the stock was to be owned by Triumph.

The parent corporation was to purchase the equipment and supplies and charge the sums paid out to Elk Mills (R. 44, 45, 422) and was to receive a flat 10% profit on the face amount of the contract, with Elk Mills performing all the work (R. 44).

Approval by Board of Directors.

This proposal was approved by the Triumph's Board of Directors, at a meeting dated December 11, 1941, pursuant to the customary broad notice, but was expressly made "subject to the People's Pittsburgh Trust Company and Federal Reserve Bank of Cleveland having no objections thereto" (R. 45, 46).

Proposed Plan Laid Before Banks.

On returning to Pittsburgh Mr. Weil, in accordance with the proposal, contacted Mr. Lucas, the vice-president of the People's Pittsburgh Bank, to lay the plan before him and determine whether the banks had any objections to the plan. Mr. Lucas asked Mr. Weil to submit the proposal in writing and on December 15, 1941, Mr. Weil had a personal interview with Mr. Lucas and submitted to him a letter, dated the same day (R. 258, 259), which detailed the arrangement Triumph proposed to make (R. 267-272), as explained above, in order to carry out the incendiary bomb contract. Mr. Lucas felt that he should consult the officials of the Federal Reserve Bank of Cleveland and, accordingly, he and Mr. Weil went to Cleveland and had a conference with the managing officials of the Federal Reserve Bank in that city (R. 261). The letter that Mr. Weil had prepared for Mr. Lucas, setting forth the proposed plan was taken along and was carefully pondered not only by

the officials of the banks but by their counsel (R. 261). In a part of this letter it was explicitly stated:

> ". . . in view of the foregoing situation,—first, the refusal on the part of the banks to permit Triumph to expend approximately $200,000 additional for capital assets" . . . etc.

Approval by Banks.

After considerable study, the banks stated that they had no objection to the proposed plan. The banks knew that by authorizing Triumph to make the capital expenditure in the required amount the entire plan to form a new corporation would become unnecessary, but not once was this suggested by the banks (R. 266).

Plan Put Into Effect; Elk Mills Model Plant.

The plan was then put into operation, except that the petitioner was not to receive any stock in the new company, contrary to the informal proposal in the Feldman memorandum; and in fact the petitioner received no stock. Elk Mills Loading Corporation became a model plant for the manufacture of incendiary bombs. Ingenious techniques to facilitate the loading operations and other time-saving features were devised by the key men (R. 417, 418). It was the finest plant of its type in the country (R. 419) and soon began to produce ahead of delivery schedule on this new explosive.

Shirley and MacBride Testimony.

These men were directors of Triumph. They were both present at the board meeting dated March 17, 1942, in which the minutes disclosed a discussion of Elk Mills. They both said they heard no talk of Elk Mills at that time and did not know of this corporation until October 1942. However, a resolution which they inserted in the minutes

of October 7, 1942, shows that they left the March 17th meeting before the Elk Mills discussion (R. 62).

The evidence further showed that it was extremely difficult to get them to attend meetings and that they were present at only one other meeting besides that of March 17, 1942 (R. 77-78). These directors had free access to the minutes of all meetings and could easily have acquainted themselves concerning all previous happenings at the meetings they missed. A bit of evidence showing the complete lack of secrecy about Elk Mills was furnished by the government's witness, Forestell, who testified, without contradiction, that the name Elk Mills was at all times painted in large letters on a door in the main corridor of the Triumph office building (R. 505).

Inter-Company Accounts Accurately and Properly Kept—Triumph's Profits.

Witness Oldham, the representative of the F. B. I. in charge of this investigation, stated that the inter-company accounts between Triumph and Elk Mills were at all times treated properly and accurately (R. 333, 336). The Elk Mills profit and loss statement up to July 31, 1942, showed a profit, after salaries to officers and consultants, of $219,000 (R. 316) and the profits were put into fixed assets (R. 317). Triumph, in accordance with the agreement, paid all expenditures for Elk Mills, and billed Elk Mills for the sums laid out (R. 318), and on the overhead expenses, by a supplementary agreement, Triumph charged Elk Mills 5¢ per bomb. Under this arrangement the profits to Triumph were as follows:

55% (due to ownership of that proportion of Elk Mills stock) of the profit of $219,000 made by Elk Mills (R. 336).

10% on the face of the contract, amounting to approximately $61,000 (R. 337).

Triumph also received the 5¢ per bomb, above mentioned, totaling $80,000, for services rendered to Elk Mills, such as watchmen's services, office rent, secretarial expenses, etc. (R. 425). This resulted in a profit to Triumph of some $40,000 since the total actual cost of providing these services was approximately $40,000 (R. 426).

Petitioner's Earnings.

The petitioner was made vice-president of Elk Mills. His duties pertained to administrative matters (R. 437) and efforts to secure independent financing and banking accommodations for the subsidiary (R. 438). For his services to Elk Mills he received $3,033.34 in salary and $5,000 in bonus (R. 437). A similar bonus was declared by the Elk Mills Board of Directors on May 27, 1942, to each of its officers and technical advisers (R. 213, 217). One of these bonus checks to V. G. Willis, Jr., a consultant, is the basis of the third count. The petitioner's total earnings from Elk Mills were $8,033.34; his earnings from Triumph were merely nominal, totaling only $1,050 (R. 382).

Defect in Title Prevents Consummation of Land Purchase for Elk Mills.

It will be recalled that the key men were to purchase a suitable site for the buildings of Elk Mills, and, as the consideration for their transferring the land, received 45% of the stock of Elk Mills. It developed that there was a flaw in the land title (R. 500, 501) which necessitated court action (R. 504) and consequent delay. Meanwhile, Triumph had taken the contract for the land in order to protect its rights to a waterway (R. 499, 503). The petitioner, on his periodic visits, made repeated inquiries of the key men as to why the land had not been paid for and was from time to time informed that they were ready to pay for the land (R. 421) but that the settlement had been held up

because of the defect in title which had to be removed before the transaction could properly be completed (R. 421, 500).

The Lumber Deal.

During the latter part of August, 1942, when the Government began an examination of Triumph for the purpose of price renegotiation, the petitioner learned for the first time (R. 420) about the so-called "lumber deal". It appears that Stephen R. Jackson was the contractor who did construction work both for Triumph and Elk Mills (R. 139, 141). Messrs. Feldman and Deibert (R. 142-4), two of the key men, instructed him to use certain timber on the Elk Mills tract in constructing the buildings of that corporation. After Mr. Jackson finished work on these buildings he was told by W. L. Kann, Jr. (not the petitioner), that the timber belonged to the five key men, Feldman, W. L. Kann, Jr., Deibert, Prial and Willis, and was given a bill for $12,062.18 for the timber (R. 154). When, contrary to his understanding, Mr. Jackson found that he had to pay for the timber, he in turn billed Triumph in the same amount and received a check of Triumph for that amount (R. 158). Jackson then gave his check in like amount to the five key men. The net effect was that money of Triumph was improperly appropriated by the key men. This check is the basis of the third count.

When this transaction for the first time came to the petitioner's attention in the latter part of August, 1942 (R. 420) he promptly said that it was all wrong (R. 238, 244); that he disapproved of it; and that he would see to it that the matter was straightened out by requiring the key men to pay back the sums they had received (R. 244, 432). And the money was paid back (R. 339, 432).

The petitioner had no part in these dealings with Jackson (R. 177) and he never received any part of Jackson's check

to the key men (R. 153). However, Jackson testified that on the occasion when he received Triumph's check for $12,062.18 on July 21, 1942, he had discussed the matter with W. L. Kann, Jr., in the latter's office in the Triumph Building, and on coming out of the office (R. 184) they met the petitioner walking down the corridor (R. 184). W. L. Kann, Jr., in Jackson's presence, asked the petitioner, ". . . if it was all right to pay the bill" (R. 161) (later the witness used the words "lumber bill" and "lumber account"), the petitioner replied, "I don't see why not" and walked on (R. 184). There was no explanation or discussion (R. 184) and the conversation consisted solely of the single question and answer and lasted "possibly a few seconds" (R. 179). The witness' recollection as to whether his bill was at hand during the conversation varied, but his last testimony on this was that it was not present (R. 181, 163, 172). The petitioner, as previously stated, had nothing to do with construction generally or with the construction of the Elk Mills buildings specifically (R. 177), nor did his duties include looking after the payment of bills (R. 177). He knew that Jackson was the builder (R. 165); that as such Jackson was entitled to be paid in instalments from time to time (R. 433); and that some of Jackson's bills *were for lumber purchased on the outside* (R. 165, 433).

The petitioner had no recollection of this conversation (R. 428). He denied that he was in Elkton on July 21st, the date when the conversation is supposed to have occurred, and on the 22nd (R. 428), the date of Jackson's bill. His recollection was confirmed by copies of letters from his file rushed to Baltimore during the trial from the petitioner's office in Pittsburgh, which showed that he was in Pittsburgh (R. 431) and had written letters transacting business in that city on those dates (R. 431, 432).

After the ramifications of this transaction were made known to the petitioner, and since the key men had not as yet paid for the land, they were required to turn back to Triumph the 45% stock of Elk Mills which they held, thus making Elk Mills a wholly owned subsidiary. Thus, no loss to Triumph resulted from the lumber deal.

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in failing to hold:

(1) That the District Court for the District of Maryland erred in refusing to instruct the Jury that their verdict should be "Not Guilty" because the uncontradicted evidence showed that the schemes alleged were completely consummated before the mails were used and, therefore, the mails were not used for the purpose of executing said schemes.

(2) That the District Court for the District of Maryland erred in refusing to instruct the Jury that their verdict should be "Not Guilty" because the evidence was legally insufficient to prove fraud on the part of the petitioner.

REASONS FOR GRANTING WRIT.

I. Conflict of decisions of Circuit Courts of Appeals.

The Circuit Court of Appeals below decided that where a check obtained by fraud is cashed by a bank and the bank then mails the check for its own reimbursement, there is a use of the mails within the prohibition of the statute. The Court held that the fraud was not complete until the check cleared and was paid by the bank on which it was drawn. This ruling is in direct conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *Stapp v. U. S.*, 120 F. (2d) 898 (1941), in which the court decided that where a check secured by fraud is cashed and

the schemer receives the proceeds the scheme is at an end, and the later mailing of the check by the cashing bank to obtain reimbursement is not in furtherance of the scheme. The irreconcilability of that conflict is illustrated by excerpts from the opinions.*

Present Case, C. C. A. 4

"The indictment charged a scheme to defraud Triumph, and Triumph was not defrauded, i. e., suffered no economic detriment, until the check had been received through the mail by the Pittsburgh Bank and had been charged against Triumph's account in that bank. Thus, the complete and final success of the fraudulent scheme required the use of the mails for its ultimate successful consummation."

Stapp Case, C. C. A. 5

". . . it is apparent the purpose of the scheme to defraud Christian [the victim] had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction."

In the present case, the sole object of the scheme, the money, was obtained before the mails were used. It is, therefore, difficult to understand why the court below in-

* In the present case, the Court below did not discuss the mailing feature at any length but referred to its decision in *Decker v. U. S.* (No. 5175), a companion case, as embodying the view of the Court. The quotation used is, therefore, that of the Decker case.

sists that the success of the scheme required the use of the mails.

The Court in our case also overlooks that Triumph was damaged beyond recall when the banks cashed the checks. The holding that no economic loss resulted until the checks were charged against the company's account conflicts with the Uniform Negotiable Instruments Act as interpreted by the Courts of Maryland, where the offense is alleged to have been committed.* The banks were holders in due course after cashing the checks and therefore payment could not be stopped against them.

The reasoning in the *Stapp* case has been adopted and approved in *U. S. v. McKay,* 45 F. Supp. 1001, which was decided by the District Court for the Eastern District of Michigan in July, 1942. The same question was presented. Said the Court in that case at page 1006:

> "Under the authorities above referred to, and with particular reliance upon the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Stapp v. United States,* supra, the Court holds that the subsequent mailing of the check by the bank in question in order to reimburse itself for the funds it had paid out does not constitute a mailing in furtherance of the scheme charged in the indictment, and that the demurrers to the two counts of the indictment should be sustained."

In *Dyhre v. Hudspeth, Warden,* 106 F. 2d 286 (10 C. C. A.), the question was also presented and the Court ruled that a use of the mails by a cashing bank to obtain reimbursement is not in furtherance of the scheme since the

* Article 13, Sec. 76 of the Maryland Code provides: A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument in the full amount thereof against all parties liable thereon. See *Dean v. Eastern Shore Trust Company,* 159 Md. 213 (1930).

scheme was at an end when the schemer received the merchandise which was the object of the artifice:

> ". . . the charge clearly shows that the U. S. mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

II. The Court below interpreted the Mail Fraud Statute in a way probably in conflict with the decision of this court in *U. S. v. Kenofskey*, 243 U. S. 440.

In the *Kenofskey* case, this Court recognized the uniform rule that when a scheme has been completely executed a later use of the mails cannot be made the basis for prosecution; and it was said, the payment and receipt of money obtained by fraud executes the scheme. In the Decker opinion incorporated into the opinion in the present case the Court avoided the determination of whether the schemes had ended before the checks were mailed by saying that it was unnecessary to consider whether or not the banks cashing the checks acquired title to the checks and thus mailed them in the role of owner. But it is essential to determine that question in order to arrive at a correct answer to the ultimate, vital question, whether the scheme had ended before the checks were mailed. If the banks became the owners of the checks when they were cashed, (and it seems this cannot be controverted under the Negotiable Instruments Law and the decisions*), then

* In *Burton v. U. S.*, 196 U. S. 283, 297, this Court decided that when a check is deposited in a bank and the amount unconditionally credited to the depositor, the bank becomes the owner of the check, and when it mails the check for clearance, it is acting on its own account as owner of the check. In the present case, the checks were cashed, so there is no question but that the banks became the owners and mailed the checks for reimbursement as such.

the use of the mails by the banks was to serve their own purpose—reimbursement. The liability of the maker was fixed when the checks were cashed; there could be no retraction because the banks were holders in due course. Since the defendants had already received the proceeds of the checks, the scheme was at an end and the mails were not used in furtherance. The mails were used solely to further the banks' interests. By ignoring this vital point the Court below improperly obliterated the distinction between a mailing during the life of a fraud and one occurring after the fraud has been completed.

III. The case involves the proper interpretation of the mail fraud statute on a question which has resulted in conflicting decisions in the United States Circuit Courts of Appeals and has not been, but should be, settled by this Court.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE PETITION.

FACTS.

Petitioner relies upon the facts as set out in the petition.

ARGUMENT.

I.

The evidence shows that the schemes alleged in the indictment were complete before the mails were used and therefore it cannot be said that the mails were used for the purpose of executing those schemes.

Foreword.

At the trial in the District Court and on appeal, both the Government in its brief and the Court below in its opinion made no distinction between the checks set forth in the second and third counts. Both checks were treated as having been cashed. We shall follow that treatment. The second count was based on Jackson's check to the key men in the lumber deal; the third count was based on one of the bonus checks given to V. G. Willis, a consultant.

Near the close of the opinion below the court says there was substantial evidence which indicated that the "conspiracy" was a continuing one but the evidence which supported that conclusion was not even mentioned, much less discussed. We respectfully submit, no evidence was introduced to show any continuing scheme nor was any effort made to show any relation between the checks in the second and third counts. They were completely separate transactions and mere assertions cannot connect them.

The opinion below speaks of the mailing of "letters" to the postmaster at Elkton, Maryland, asking that all mail

for Elk Mills be placed in the post office box of Triumph, as showing a contemplated use of the mails. The stipulation (R. 114-115) showed only one letter of that nature. It should be noted, however, that Judge Chesnut in his Charge to the Jury said the letter merely showed that Elk Mills, as every bona fide business corporation, naturally expected to use the mails (R. 579) It was so clear that this letter had no possible relevancy on whether the mails were used in executing the scheme that the Judge instructed the Jury to disregard it (R. 578-9) and the prosecution did not object to the Court's action. Evidently the appellate court overlooked this ruling when it commented on the letter.

The only use of the mails in the case was by the banks to obtain reimbursement after cashing the checks.

The Law.

The decisions uniformly hold that where a fraudulent scheme has been fully executed, a subsequent use of the mails is not for the purpose of executing, or in furtherance of, the scheme, as required to support a conviction.

> *Hart v. U. S.*, 112 F. 2d 128 (C. C. A. 5) (1940);
> *Spillers v. U. S.*, 47 F. 2d, 892 (C. C. A. 5) (1931);
> *U. S. v. Kenofskey*, 243 U. S. 440 (1917);
> *Stapp v. U. S.*, 120 F. 2d, 898 (1941);
> *U. S. v. Mitchell*, 126 F. 2d, 550, 554;
> *U. S. v. McKay*, 45 F. Supp. 1001.

If then, a use of the mails after the scheme is completed does not violate the statute, the question arises as to when a scheme is at an end. In the instant case there is no suggestion that the mails were used to lull the victim into repose. Since the sole object was the receipt of money, the scheme ended when the money was received. It is submitted that this simple test is the correct one; and any other

criterion would be unrealistic and not in accordance with the law.

The case of *Stapp v. U. S.*, 120 F. 2d 898 (C. C. A. 5) (1941), evidences the court's insistence that it is not enough for the defendant to have devised a fraudulent scheme and that the mails be used by someone as a result of that scheme. The mailing, the Court says, must be in furtherance of the scheme. In that case one Christian, the victim, was induced to believe that the defendant Stapp was an agent of an oil company authorized to buy an oil lease for it from the defendant Rudder for the price of $8,000, but that Stapp could really buy the lease for $4,800. The proposal was made and accepted by Christian that he buy it from Rudder for $4,800 and in turn Stapp would buy it from him for his principal for $8,000, the profit of $3,200 to be divided between Christian and Stapp. Christian went to the Pauls Valley Bank with a letter of credit issued by the Tyler Bank. He purchased a cashier's check of the Pauls Valley Bank with a check drawn on the Tyler Bank and bought the lease which subsequently proved valueless. Rudder accepted the cashier's check, payable to himself and the next day cashed that check at the Pauls Valley Bank and received the money. In the regular course of business, Christian's check drawn on the Tyler Bank and the letter of credit were sent through the mails by the Pauls Valley Bank for its reimbursement.

The Court recognized that a mailing may be made the basis of a prosecution even though done by an innocent agent, but insisted that it is vital to the commission of the offense that the mailing be in furtherance of the scheme. The mailing was held not to be in furtherance of the scheme because the victim had already been defrauded.

The Court said (page 899):

> "In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian (the victim) could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction."

In our case there could be no retraction after the payees cashed the checks because the banks were holders in due course. The payees had already received the proceeds and were completely indifferent whether the banks used the mails for collection or not.

In *U. S. v. McKay*, 45 F. Supp. 1001 (1942), the scheme was one to defraud the contributors to the campaign of Governor Fitzgerald. McKay falsely represented by means of spurious unpaid invoices that a large deficit was due a certain advertising agency for services rendered during the campaign. The scheme, aimed at great numbers, was successful in at least one case, that of Edsel Ford, who made two separate contributions at different times. Both checks were deposited and cashier's checks were secured. The banks then mailed the checks for clearance.

In sustaining the demurrer and dismissing the indictment, the Court declared:

> "The statute specifically provides that the United States mails must be used 'for the purpose of executing such scheme or artifice or attempt so to do.' It is vital to the commission of the offense that the use of the mail relied upon by the Government be in furtherance of the alleged scheme. The demurrer to the

indictment attacks its validity on the ground that the indictment shows on its face that the use of the mails relied upon by the Government in each count was not for the purpose of executing the scheme or artifice charged, but on the contrary occurred after the completion of the alleged scheme and at a time when the fraud, if any existed, had been fully perpetrated. Defendant relies upon the well settled rule that *the mailing of a letter or check, even though connected with or relating to a scheme to defraud, if not for the purpose of executing the scheme, will not support an indictment under the statute.* If the scheme charged was completed before the mail was used, the offense denounced by Section 215 of the Criminal Code does not exist." (Italics supplied.)

In the instant case, as in the *McKay* case, the money was received before the checks were mailed.

Said the Court in that case (p. 1006):

"Under the authorities above referred to, and with particular reliance upon the recent decision of the Circuit Court of Appeals for the Fifth Circuit in Stapp v. United States, supra, the Court holds that *the subsequent mailing of the check by the bank in question in order to reimburse itself for the funds it had paid out does not constitute a mailing in furtherance of the scheme* charged in the indictment, and that the demurrers to the two counts of the indictment should be sustained." (Italics supplied.)

So, in the case at bar, the mailing by the banks for their own reimbursement had no relation to the scheme since the proceeds of the check had already been received by the payees.

In *Dyhre v. Hudspeth, Warden*, 106 F. 2d (C. C. A. 10) habeas corpus was brought after plea of guilty. The indictment alleged that the defendant represented he had

bank accounts in certain banks and issued checks for various amounts payable to the persons to be defrauded, although he had no money on deposit and no intention that the checks should be paid; and that in and for executing the scheme caused a check to be sent and delivered through the mails.

Said the Court at p. 298:

> "The fraud charged in each of these counts standing alone is not within the jurisdiction of the Federal court, but it may be brought within that jurisdiction by charging that defendant used the U. S. mail 'for the purpose of executing such scheme or artifice or attempted so to do.' That was charged here, but the charge clearly shows that the U. S. mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

Citing *McNear v. U. S.* (C. C. A. 10), 69 F. 2d 861, where the prosecution failed because the scheme was complete, among other cases.

The case of *U. S. v. Kenofskey*, 243 U. S. 440 (1917), although it dealt with the mailing of a fraudulent letter rather than the mailing of a check by a bank, supports our contention that a scheme like the instant one ends when the money is received. There the schemer presented a false letter and proof of death in an insurance claim to his superior, intending that the latter should then mail the false matter to the home office where the claim had to be approved before payment could be made. It was argued that the scheme was completed when the false claim was

handed to the superior, but the Supreme Court rejected this contention, saying:

> "We do not think the scheme ended when Kenofskey handed the false proofs to his superior officer. . . . The most vital element in the transaction both to the insurance company and to Kenofskey remained yet to become an actuality, that is, the payment and receipt of the money. . . . *Such payment and receipt would indeed have executed the scheme* but they would not have served to 'trammel up the consequence' of the fraudulent use of the mails." (Italics supplied.)

Thus this Court recognized that the payment and receipt of the money would have executed the scheme; and although such payment and receipt *after* the mailing could not defeat the prosecution in the *Kenofskey* case because the use of the mails there was prior to and was the means of accomplishing such payment and receipt, yet in the instant case, the payment and receipt of the money by the defendants occurred *before* the use of the mails.

The Court below cited the case of *Tincher v. U. S.* (4 C. C. A.) 11 Fed. 2d 18, as authority for its holding that the mailings in the present case were in furtherance of the fraud. But in that case the money was not obtained until after the checks had completely cleared, whereas the collection of the checks in the instant case was immaterial to the defendants since the proceeds were already in their possession. The indictment there consisted of four counts. The first count had as its basis the use of the U. S. mails, during the promotion of the fraud in transmitting a letter containing a lease and note. This use of the mails was the foundation for the entire fraudulent scheme. And it will be found by reference to the record and briefs as well as the opinion, that this aspect of the case was treated by the Court as well as by counsel on both sides as the very

heart of the charges against the defendants, and that the other counts were relegated to a completely subsidiary position.

The remaining counts in the *Tincher* case involved the use of the mails in connection with checks of $7,000, $3,000, and $1,000, respectively. The record indicates that these checks were cashed, not deposited for collection. However, this point was evidently not brought to the Court's attention. A close examination of the opinion reveals that the Court treated the transactions regarding these three checks as deposits for collection and that the mailing was necessary to effect the essential part of the entire scheme, to wit: the receipt and division of the money. Following this line of thought, it would be necessary for the bank, with which the checks were deposited, to forward them through the mails in the ordinary course of business before money could be realized by the defendants. If this were not so, there would be no point in the court's statement at page 21:

> ". . . the defendants caused the checks to be deposited in these banks with knowledge that the mails would necessarily be used in their collection; and the collection of the checks was a necessary part of the working out of the scheme. In fact, it was through the collection of these checks that the defendants collected and divided the spoils of their fraud."

Now, it is perfectly obvious that a deposit of checks by individuals "for collection" by one bank from another bank in reality means that the loot could not be realized until the checks were collected, and the funds forwarded to the bank in which the checks were deposited. That the court had such a situation in mind is apparent from its language.

To substantiate this statement we respectfully point out that the court cited with approval and as authority for its

position on this aspect of the case the following cases: *U. S. v. Spear*, 228 F. 485 (C. C. A. 8) (1915); *Shea v. U. S.*, 215 F. 440 (C. C. A. 6) (1918); *Savage v. U. S.*, 270 F. 14 (C. C. A. 8) (1920).

An examination, however, reveals that in all these cases checks were *deposited* with banks and the money was not obtained *until after the checks had been forwarded by mail for collection and had been paid by the drawee banks.* The mails were, therefore, used to attain the object of the schemes—the money.

How different is the situation in the instant case, where the checks were cashed and never sent through the mails for collection on behalf of the payees!

It is thus made abundantly clear that the court had in mind that the checks in the *Tincher* case were mailed *for collection on behalf of the defendants.* This conclusion is firmly grounded in the Court's own language and the authorities cited. These authorities all properly enunciate the rule that the mailing of checks, obtained by fraud, for collection, as a means of securing the money violates the statute. And it is not difficult to understand this, since in those cases the use of the mails is in direct furtherance of the vital element in the entire scheme—the receipt of the money.

We respectfully submit that the *Tincher* decision must be confined to the facts expressly found by the court and is authority only on fact situations of a similar nature.

Another case which the court below cited is *Hart v. U. S.*, 112 F. 2d 128 (C. C. A. 5) (1940). Hart, one of the defendants, deposited a $75,000 check, which had been previously obtained by fraud, in the Whitney National Bank of New Orleans. The check was thereafter forwarded through

the mails in the ordinary course of business. The Court, in affirming the conviction, said (p. 131):

> "The scheme to defraud was not at an end when Hart endorsed and presented the checks to the bank for no one had yet been defrauded. L. S. U. . . . the state and its taxpayers, sustained no actual loss until the checks had been finally paid, and it is clear that before the L. S. U. account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated."

Implicit in the Court's statement is the proposition that if, in fact and in law, it were too late for Louisiana State University to stop payment on the check, the scheme would have been a fully consummated one and the subsequent use of the mails could not have been made the basis for prosecution.

It is beyond question that under the *Maryland Code*, Article 13, Secs. 49 and 53, the banks were holders in due course of the checks which they had cashed and payment could not be stopped against them.

Article 13, Section 76 of the *Maryland Code* provides:

> "A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Dean v. Eastern Shore Trust Co., 159 Md. 213 (1930);
Helvering v. Stein, et al., 115 F. 2d 468 (C. C. A. 4);
Burton v. U. S., 196 U. S. 283 (1905).

Whatever the law may be in Louisiana, it is apparent that payment could not have been stopped in the instant

case; and if not, the entire foundation of the *Hart* case, as it affects the present case, is stripped of any persuasive value.

It should also be noted that the *Stapp* case was decided by the same Court after the *Hart* case and in effect overrules it.

The case of *U. S. v. McKay*, previously discussed at length, points out quite clearly the very thing we are urging here, and in commenting on the *Hart* decision says:

> "In relying upon and following the decision in the case of United States v. Stapp, the Court is not unmindful of the earlier ruling of the same court in Hart v. United States, which apparently is in conflict with its later ruling in the Stapp case. But the apparent conflict does not really exist when the opinion in the Hart case is carefully considered. It expressly recognized the rule that a use of the mail after the fraud was complete fails to bring the case within the statute, but held that the scheme to defraud in that case 'was not at an end when Hart indorsed and presented the check to the bank for no one had yet been defrauded.' Its ruling was expressly based upon its interpretation of the law as applied to the facts before it, which, whether it was correct or incorrect, was that the drawer of the check 'might have intervened to stop payment and the fraudulent scheme would have been frustrated.' In both the Stapp case and the present case, it was beyond the power of the victim to intervene and stop payment on the check which was the subject of the mailing."

And so, in the instant case, it was beyond the power of the Triumph Company, the alleged victim, to intervene and stop payment of the checks. In the first place, the Jackson check in the second count and the Elk Mills check in the third count were not the victim's. But aside from this, after the checks were cashed the victim could not stop payment against the banks which were holders in due course.

Summing up, the schemes were complete when the checks were cashed and the payees received the proceeds; and therefore, the later mailing of the checks by the cashing banks, to obtain reimbursement, was not for the purpose of executing the schemes.

II.

The evidence was so clearly consistent with the petitioner's innocence that the verdict of guilty cannot be justified and requires this Court to exercise its discretionary power of review.

Use of Elk Mills Necessitated by Limitation in Loan Agreement.

From the Government's view, the scheme to defraud consisted in the diversion from Triumph of profits enuring under Government contracts, to Elk Mills as a subsidiary of Triumph, and eventually to the defendants through salaries and bonuses. This was the government's basic conception of the fraud practiced upon Triumph and its stockholders, and in carrying out the plan for the use of Elk Mills, it was charged, certain fraudulent acts occurred.

If the plan to use Elk Mills had its origin in what was deemed legitimate business necessity, the government's theory that Elk Mills was formed to divert profits from Triumph must collapse. The evidence established that Triumph, before the creation of Elk Mills, had taken a contract with the War Department to manufacture incendiary bombs which it could not fulfill because the contract required a capital outlay far in excess of the limitation in the Loan Agreement with the banks. This is undisputed.

The company was in a serious dilemma. If it cancelled the contract a ruinous law suit by the Government might have resulted or, at best, the company would have incurred

the hostility of its chief customer. If, on the other hand, it went ahead and made the necessary capital expenditures itself, the banks might cancel the loan and require the full amount to be repaid forthwith. This would have been equally disastrous. What was the company to do?

Although there was no direct evidence to show that the banks would have sanctioned the very substantial additional capital outlay required, the prosecution's position was that a direct request should have been made to obtain the necessary permission. This contention ignores the evidence of difficulties encountered in the past in obtaining permission for capital expenditures which were small in comparison with that necessary to perform this contract. Moreover, while only a couple of weeks before the plan was submitted to the banks, the limit for capital outlay was raised by $60,000, it is undisputed that on this occasion there was quite a row about the matter and the corporation was warned "to watch its step". Even with this increase the corporation was permitted only approximately $6,200 additional for capital expenditures on all its contracts. To put it in the words of the petitioner: "We were in bad with the banks . . . and I don't believe we could have gotten $25,000 additional authorization, let alone an authorization of over $200,000."

The officers of the company felt there was no chance of getting the banks' permission. They decided to use Elk Mills as a subsidiary. The expenditures would then be made by the subsidiary, not Triumph. It was hoped in this way to carry out the incendiary contract and avoid trouble with the government and the banks. This plan was submitted in detail to the banks in Weil's letter dated December 15, 1942 (R. 267-272*). The letter clearly stated

* This letter reveals the entire good faith of the plan. We respectfully urge this Court to read it.

that the plan was necessary "in view of the aforegoing situation, first, the refusal on the part of the banks to permit Triumph to expend approximately $200,000 additional of capital assets . . .". The conferences that followed with the officials of the banks were clearly predicated on the assumption of all concerned, that the banks would not authorize Triumph itself to make such a large capital outlay.

In the course of his testimony, Mr. Lucas, the banker, was asked:

> "Q. Did your counsel, or did you and Mr. Zurlinden or any of your board who were considering the matter, ever suggest as an alternative that you would extend the limit of capital investment to Triumph if they would take the contract directly? A. Not in this case. It was never suggested, no. I mean it was never put up to us, therefore we never either suggested we would do it or would not" (R. 283).

The most that can be said for this testimony is that the witness did not know whether the permission would have been granted.

If the banks had been willing to permit such a substantial increase in the capital expenditure limitation under the Loan Agreement, can it be doubted that they would have so informed Weil upon being presented the plan for the formation of Elk Mills? Yet the Record says they did not do so. The fact seems to be incontestable that both the bank representatives, before whom the plan was so fully detailed, and Weil, acted on the premise that the permission would not be granted (R. 283). When these facts are considered the point that no *direct* request was formally made is reduced to a mere quibble.

Certainly the creation of subsidiaries to carry out certain contracts or duties for the parent company's benefit is so

commonplace at this date that any lengthy citation of authorities is unnecessary.

> *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 54 Atl. 570.

In *Rubino v. Pressed Steel Car Co.* (N. J. Eq.), 53 Atl. 1050, the court said:

> ". . . A manufacturing corporation, whose articles embrace a very wide variety of business, including the purchase or other acquisition of shares of stock of other corporations may form a new corporation to conduct a similar manufacturing business, with the stock largely held by the parent company, where the purpose is to increase the business and profits of the latter:
>
> Cited with approval in *Durham v. Firestone Tire Co.* (1936) 55 P. 2d 648,
>
> and see *Fletcher on Corp.*, Vol. 6, Sec. 2823."

The opinion below adopted without discussion the government's array of facts deemed sufficient to raise inferences of fraud. However, no reasoned analysis of the evidence was made and a fair consideration of the points mentioned in the opinion completely dispels these unwarranted inferences.

(a) Additional Pay.

The court lists in its category of improper acts the salaries and bonuses paid by Elk Mills to its officers and consultants. The undisputed evidence shows that the work under the incendiary bomb contract was carried on with great efficiency and by improvising entirely novel techniques. The key men, in their duties to Elk Mills, were doing work that was outside the range of their duties for Triumph. Surely they were entitled to additional compensation for their efforts, which incidentally substantially benefited the parent company as well as the subsidiary.

Primarily, the amount of such compensation is for the directors and ordinarily the civil courts are the tribunals before which such a question is presented if a dispute arises. But here is a criminal prosecution. The striking feature in this case is that we do not find the so-called defrauded parties, Triumph Explosives or its stockholders, complaining from the witness stand, and the reason is not far to seek: the undisputed evidence from the government's own witnesses shows that Triumph benefited to a very large extent under the Elk Mills plan.

(b) Lack of Knowledge by Certain Directors About Elk Mills—Shirley and MacBride.

The Court asserts that three directors of Triumph knew nothing about Elk Mills until the investigation by Commander Seldman. Is this any evidence of fraud, particularly in the light of the only explanation given by these directors themselves as government witnesses? The evidence shows that Diamondstone, one of these directors, was not present at the meeting in which Elk Mills was discussed, nor is it shown that he was present at any subsequent meetings. As to the other two directors, Messrs. MacBride and Shirley, they were both present on March 17, 1942, at the meeting in which Elk Mills was discussed, but their later resolution shows that they left before Elk Mills was discussed. It is also to be noted that these two directors attended meetings very rarely. In answer to the Court's question, Mr. MacBride said that he was present at only one meeting between December 11, 1941, the date of the first Elk Mills discussion, and October, 1942. The same applies to Mr. Shirley. It is difficult to understand how the court below infers from this any fraud or inference of fraud. These directors just did not attend to their duties, and so they knew nothing about Elk Mills.

There is a significant bit of evidence which shows that the use of Elk Mills as a subsidiary was not a secret at all but was clearly apparent to anyone. We refer to the testimony of the government witness Forestell, who said that the name "Elk Mills" was painted in large letters on a door in the main corridor of the Triumph office building (R. 505). If there was any intention to keep Elk Mills a secret there certainly would be no reason to advertise the name in this exposed place.

(c) Notices to Directors of Meeting.

The Court states that the notices of the Directors' meeting at which Elk Mills was approved did not specify that Elk Mills was to be considered. Of course the notice of the meeting of Directors of December 11th contained no reference to the formation of Elk Mills Loading Company! The testimony showed that Mr. Kann received a memorandum from Feldman dated December 3, 1941, which was his first knowledge of the Elk Mills and incendiary bomb picture; that a few days thereafter he consulted Mr. Weil, and requested him to come to Elkton to discuss the matter. It was not until Kann and Weil arrived at Elkton on the morning of December 11th, the day of the meeting, and talked with Decker and the five key men, that the situation was revealed with sufficient clarity to attempt a solution. Prior to December 11th the only thing that could have been set forth in the notice of the meeting would have been some absurd statement, as one of the purposes: "To discuss the performance of an incendiary bomb contract entered into without the President's knowledge and the use of a company known as Elk Mills Loading Company, the incorporation costs of which have been paid by Feldman." There was nothing improper in the notice to the Directors of the meeting in which Elk Mills was discussed. The call was in the customary broad language

and it was not necessary to specify that any proposal relating to Elk Mills was to be discussed. Interpretations of the by-laws may vary, but no inference of criminal fraud can be drawn from the mere fact that the call for the meeting did not specifically mention Elk Mills.

(d) Alleged Falsity of Minutes.

The Court says the minutes were false because they showed five Directors present at the March 17th meeting, whereas only three were there. This statement is without foundation in the Record. The minutes were not false. They show that the five Directors were present, and if perchance the minutes failed to note that one or more Directors left the meeting before its conclusion, it cannot properly be claimed that the minutes were false. It is customary for secretaries of corporate meetings to note the names of those present at the opening of the meeting, and if anyone leaves before the end of the meeting, that would scarcely be mentioned in the minutes. Certainly failure to do so is no evidence of fraud on the secretary's part or of anyone else.

(e) Domination of Elk Mills.

The Court says that Kann and two other Directors could dominate Elk Mills. Granted. The evidence shows that at Mr. Weil's instance 55% of the stock in Elk Mills was retained by Triumph to assure control for its protection. Such control would normally be exercised by the Triumph officers.

But the question of control is a false issue. It may be conceded that Kann and any two other directors could control Elk Mills. The petitioner is not seeking to escape on the ground that Elk Mills was not used by Triumph with his full consent. His point is that this use was for legitimate reasons. The argument about "control" merely confuses the issue, and proves nothing.

(f) Demeanor and Bearing of Petitioner.

The statement that Kann's demeanor when interviewed was such as to justify the idea that he was guilty is refuted by the Record and is a piece of sheer fantasy. As soon as Kann learned of the lumber deal, he immediately stated it was wrong and that the money should be paid back. Not only this, but he likewise insisted that because of their breach of the agreement the five men should return their stock to the company. What could be more honest or proper on the part of the defendant? And the key men agreed to do so upon the appellant's insistence. Is resort to this sort of catching at thin air to justify the guilty verdict, capable of defense?

(g) Letter from Weil Criticizing Minutes.

The letter referred to by the Court clearly relates to tax matters, not to the formation of the Elk Mills Company. In this connection, it must be remembered that the plan was adopted on December 11, 1941, and the letter was written the following February, after the banks had approved the plan. Moreover, the letter demonstrates what the government attempted to disprove, namely, that the key men were personally to pay for the land and transfer it to Elk Mills as consideration for their receipt of 45% stock of that company. In testing the petitioner's state of mind this letter is a strong indication that he and his attorney fully expected the key men to pay for the land.

(h) Use of Triumph Facilities and Employees.

The use of Triumph's employes and facilities was arranged by contract between the corporations when it was found that such use would result in a more efficient method of operation. The F. B. I. agent, Oldham, it will be recalled, testified that the inter-company accounts were properly and accurately kept. Elk Mills paid for these services at 5¢ per bomb. The Record shows that Triumph

as a result made a profit of some $40,000.00 (R. 426). It is difficult to understand what prompted the Court below to list this feature as justifying any inference of fraud. If anything, it tends to show the complete honesty of the arrangement.

(i) The Land Purchase and 45% Stock to the Key Men.

The court's method of listing these matters without discussion lends a sinister note to a perfectly innocent transaction. The circumstances negate any idea of fraud. Under the agreement the five key men (of whom the petitioner was not one) were to purchase a suitable tract of land and transfer it to Elk Mills as consideration for the issuance of 45% stock of that company to them. It might be well to add parenthetically that although this proportion of stock may seem large, it must be recalled that there was no certainty at the time of this arrangement that large profits would be forthcoming on this contract, and of course it was the aim to provide these men with greater pay and thus make more certain their continuing in the employ of Triumph. It is a concessum in the case that a defect existed in the land title which eventually required court proceedings. The only evidence as to the petitioner demonstrates his good faith. On his periodic visits he repeatedly made inquiry as to whether the land had been paid for and he was informed by these men that although they were ready and willing to pay for the land the necessity of clearing the title prevented the consummation of the transaction. Later, when the lumber transaction, (to be discussed presently) came to light the petitioner promptly took steps to cancel the entire arrangement, and the men were required to return the 45% stock of Elk Mills which they held. Certainly there can be no imputation of fraud on the petitioner's part in this matter.

(j) The Lumber Deal.

The key men devised this improper deal. The evidence showed that the petitioner had no part in it. However, in a desperate effort to connect the petitioner with the only fraud shown in the entire evidence, the Government seized upon the testimony of Witness Jackson. This witness testified that, after discussing the matter with one of the key men in the latter's office, they came out and saw the petitioner walking down the corridor. The key man, without explanation of any kind, asked the petitioner whether it was all right to pay Jackson's bill. The petitioner said "I don't see why not"—and walked on.

The law is well settled that an officer of a corporation cannot be held criminally responsible for illegal actions of other officers in which he never joined or knowingly sanctioned.*

The Government, therefore, was forced to rely completely on this bit of testimony in its attempt to show the petitioner's knowledge of the scheme.

This same witness (Jackson) stated without contradiction that the petitioner had no dealings with him and had nothing to do with construction or the payment of bills (R. 177); that the petitioner knew that the witness was the builder (R. 165) and as such was entitled to be paid in in-

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* In *State v. Thomas*, 123 Wash. 299, 212 P. 253, it was said:

> "The general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission."

In *State v. Carmean*, 126 Iowa 291, 102 N. W. 97, the principle was stated:

> "An officer of a corporation, no matter how great his responsibility, is not as a general rule criminally liable for the acts of the corporation performed through other officers and agents who are not acting under his direction or with his permission."

See also:

13 *Amer. Jurisprudence*, Sec. 1100, p. 1027;
19 *C. J. S.*, Sec. 931—Criminal Responsibility.

stalments for work and materials; that some of the witness' bills were *for lumber purchased by him on the outside* at about the same time (R. 168); that the petitioner was not present when the key men directed the witness to make a check out to them (R. 163); that he was not one of the payees; that nothing was said in the petitioner's presence about reimbursing the key men (R. 164). With these uncontradicted facts in mind, when the petitioner while walking down the corridor was asked if it was all right to pay the "bill" (or "lumber bill") and no explanation was given, could there have been a more spontaneously innocent response than that ascribed to him—"I don't see why not"—and then continue on his way?

In order to arrive at even the slightest inference of guilty knowledge, the evidence must be subjected to violent torture. It is submitted, the proof falls far short of raising any inference other than that of innocence.

The Court below says that whatever may be the effect of an analysis of each occurrence brought forward by the prosecution to show fraud, the composite picture of all these clearly proved fraud. Composite picture of what? Of circumstances either fully explained or the deductions from which were more consistent with innocence than guilt? Resort to such sweeping generalization cannot take the place of reasoned analysis of the evidence to demonstrate that the circumstances were inconsistent with innocence. But this, the court below did not undertake to do.

The evidence was not merely consistent with innocence, which under the authorities is sufficient for reversal,* but it was entirely inconsistent with any other conclusion.

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* *Chambers v. U. S.*, 237 Fed. 513:

"Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate Court to reverse a judgment of conviction. *Harrison v. U. S.*, 200 Fed. 662; *Isbel v. U. S.*, 227 Fed. 788."

CONCLUSION.

On the mailings, the evidence showed that the checks were mailed after the alleged schemes were complete and only for the bank's reimbursement; therefore not in furtherance of the alleged frauds.

As to the evidence, we confidently assert that the court will find that legitimate business necessity compelled the use of Elk Mills as a subsidiary of Triumph. There was absolutely no fraud in this arrangement and the subsidiary proved financially beneficial to Triumph and its stockholders. In the ensuing transactions which the Government contends constituted fraudulent schemes, with the exception of the lumber deal, no fraud in reality was intended or perpetrated. On the lumber deal, the evidence disclosed a fraudulent scheme by the key men, but the petitioner had no part in it and knew nothing about it until a later date, when he took steps to compel repayment of the money to Triumph. In view of the complete absence of any real proof of guilt, it is plain that the verdict of the jury and the decision below were arrived at by piling inference on inference, a practice condemned by this Court. We can only point to the present war period, with the inevitable tendency to undiscriminating severity in any matter relating to the manufacture of munitions and the dramatic seizure of the plant, as explaining, but not justifying, the verdict.

Upon the whole case it is submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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